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M&A transactions and personal guarantee from the business partner: is the "uxory grant" necessary?

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People who do business are often haunted by difficult-to-understand legal terms. One of them is the uxory grant. Despite the far-fetched name, it simply refers to the authorization that someone who is married – under any regime other than total separation of property – needs to obtain from his/her spouse to carry out certain transactions.

One of the transactions that depends on this authorization is the personal guaranty (fiança). In this type of guarantee, the person who provides the guarantee is responsible with his personal assets for the fulfilment of an obligation assumed by another person[1].

Recently, the STJ judged a case on the need for a uxory grant when the guarantor guarantees obligations assumed by a company in which she is a partner.

The company rented a property and the partner guaranteed the payment of the rent. The company failed to pay the rent and the owner of the property sought the guarantor partner's assets, but her husband asked for the annulment of the guarantee, which had been provided without her authorization.

The lower court denied on the grounds that the spouse's authorization would not be necessary when the guarantee is provided by a business partner. The upper court - the São Paulo Court of Justice (TJSP) - decided the case in the opposite way - any personal guarantee provided without the uxory grant would be illegal, even if provided in the context of business activities.

The dispute was taken to the STJ (Superior Justice Tribunal) in Special Appeal number: 1,525,638/SP[2]. STJ maintained the decision of the TJSP (São Paulo Court of Justice). STJ decided that in the personal guarantee, the guarantor is personally liable for the debt, and, therefore, the jointly-owned assets of the couple are exposed to risk, which makes the spouse's authorization necessary.

STJ's decision reinforces the understanding that the guarantor's position as a businessperson is irrelevant to determine the need for the uxory grant.

In M&A transactions, the discussion about the need for a uxory grant usually comes into play when one of the parties to the deal requires additional guarantees.

This happens, for example, when the seller requires the guarantor to answer for the payment, by the buyer, of a future installment of the price. It can also happen when the buyer asks for a guarantor to to answer for the payment of obligations assumed by the seller, such as the obligation to indemnify.

In this context, if the protection offered is a personal guarantee, the parties must be aware of the need for the uxory grant. Parties that have already contracted such guarantee without the grant may also seek subsequent ratification by the spouse.

Parties can also consider other forms of protection s. The main one is the joint and several liability, where a party assumes the obligation as a joint debtor, i.e, answering for the obligation under the same terms and conditions applicable to the main debtor. In this case, Brazilian courts have decided that the joint debtor does not need to obtain the uxory grant. However, it is necessary to consider that, if the spouse does not assume the obligation on a joint and several basis, then the creditor will not be able to reach the portion of the couple's assets that belongs to such spouse.

The conclusion is that parties need legal advice in clear and accessible language, so that they can negotiate and adequately reflect their will in the contracts and also obtain the necessary authorizations for the validity of their transactions.

NOTES:

[1] As a rule, the law guarantees the guarantor the benefit of the order: that is, the creditor must first activate the main debtor, before seeking the guarantor's assets, unless the contract provides for the waiver of the benefit of the order by the guarantor.

[2] STJ (Superior Justice Tribunal), 4th T., special appeal, number 1,525,638/SP, Rapporteur Minister Antonio Carlos Ferreira, j. 6.14.2022, DJE (electronic justice diary) 6.21.2022.

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